Ganad Media Sdn Bhd v Dato' Bandar Kuala Lumpur (No 2)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-21-31 OF 2001
ABDUL MALIK ISHAK J
29 DECEMBER 2001

Local Government *— Signboard and advertisement — Licence — Unilateral withdrawal of — Injunction to restrain removal of advertisement — Whether injunction could issue against local authority — No real prospect of succeeding for permanent injunction at trial — Whether damages adequate remedy — Advertisements (Federal Territory) By-laws 1982*

The defendant was a local authority having the conduct of the affairs of the city of Kuala Lumpur. Pursuant to s 102 of the Local Government Act 1976, the Advertisements (Federal Territory) By-laws 1982 ('AFT By-Laws') was applied to the Federal Territory. The defendant had authority to issue licences and did in fact, by virtue of the AFT By-Laws issued licences to the plaintiff to exhibit the 'Marlboro' advertisement ('the advertisement') at No 67 Jalan Sultan Ismail, Kuala Lumpur and No 127, Jalan Bukit Bintang, Kuala Lumpur ('the premise'). Later, the defendant issued various notices to the plaintiff and such notices culminated with the notice asking the plaintiff to remove the advertisement, which was displayed in the premise. The plaintiff applied for a declaration that the defendant was not entitled to unilaterally withdraw the licences and that the defendant had failed to comply with the principles of natural justice. The plaintiff also succeeded in obtaining an ex parte injunction to restrain the defendant from removing the advertisement. In the meantime, the plaintiff had unilaterally removed the advertisement from the premises, which was the subject matter of this case. The plaintiff had displayed another advertisement without licence at the premise. The defendant applied to this court to set aside the ex parte order. The plaintiff on the other hand applied for an interim injunction to restrain the defendant from removing the advertisement from the premises.

Held:

(1) The defendant was subservient to the minister charged with the responsibility for local government and as a government department, the defendant could not be subject to an injunction, be it interim or perpetual (see p 522E–F).

(2) An injunction would only be granted against a local authority or a public authority when the plaintiff has a real prospect of succeeding in his claim for a permanent injunction at the trial. The plaintiff's case for a declaration that the defendant had withdrawn the licence unilaterally without giving a fair hearing to the plaintiff was devoid of any merits and it was solely filed to delay and frustrate the defendant from exercising his statutory

duties. On the facts, the plaintiff had failed to satisfy the pre-requisite test as laid down in *Smith & Ors v Inner London Education Authority* [1978] 1 All ER 411, in that there was no real prospect of succeeding for a permanent injunction at the trial (see pp 523E, 530H–I).

(3) If the plaintiff was a responsible company, it ought to have notified its client in regard to the status of the licence. Furthermore, the plaintiff should act with circumspection and must act within the confines of the AFT By-Laws. The plaintiff should be wary and must not enter into any contract with its client unless it had secured its licence with the defendant. The conduct of the plaintiff in not complying with the provisions of the law and had entered into a contract with its client without a valid and subsisting licence was a conduct not befitting of a responsible company. The plaintiff had failed to show that damages was not an adequate remedy since damages was easily quantifiable, thus the injunctive relief ought to be disallowed (see pp 531C–E, 532F).

(4) In the present case, the balance of convenience weighed heavily in favour of the defendant who was merely performing a duty under the statute. The plaintiff had shown utter and gross disrespect to the defendant and more importantly to the provisions of laws in the country (see p 533A, C).

[Bahasa Malaysia summary

Defendan merupakan pihak berkuasa bagi kawasan perbandaran Kuala Lumpur. Menurut s 102 Akta Kerajaan Tempatan 1976, Undang-Undang Kecil Pengiklanan (Wilayah Persekutuan) 1982 ('Undang-Undang Kecil PWP') adalah terpakai kepada Wilayah Persekutuan. Defendan berkuasa mengeluarkan lesen dan memang telah, mengikut Undang-Undang Kecil PWP, mengeluarkan lesen kepada plaintif untuk mengekshibit iklan 'Marlboro' ('iklan tersebut') di No 67 Jalan Sultan Ismail, Kuala Lumpur dan No 127, Jalan Bukit Bintang, Kuala Lumpur ('premis tersebut'). Kemudiannya, defendan mengeluarkan pelbagai notis kepada plaintif dan notis tersebut berakhir dengan notis meminta plaintif supaya menanggalkan iklan tersebut, yang dipaparkan di premis tersebut. Plaintif memohon satu deklarasi bahawa defendan tidak berhak menarik balik lesen secara sepihak dan bahawa defendan telah gagal mematuhi prinsip-prinsip keadilan semulajadi Plaintif juga berjaya memperolehi injunksi ex parte untuk menahan defendan daripada menanggalkan iklan tersebut. Sementara itu, plaintif telah menanggalkan iklan tersebut daripada premis tersebut secara sepihak, yang menjadi perkara kes ini. Plaintif telah memaparkan iklan lain tanpa lesen di premis tersebut. Defendan kini memohon kepada mahkamah ini supaya mengetepikan perintah ex parte tersebut. Plaintif sebaliknya memohon injunksi interim untuk menahan defendan daripada menanggalkan iklan tersebut daripada premis tersebut.

Diputuskan:

(1) Defendan adalah tertakluk kepada menteri yang dipertanggungjawabkan dengan kewajipan kerajaan tempatan dan sebagai jabatan kerajaan, defendan tidak boleh tertakluk kepada injunksi, sama ada interim atau berkekalan (lihat ms 522E–F).

(2) Injunksi hanya diberikan terhadap pihak berkuasa tempatan atau pihak berkuasa awam apabila adalah jelas plaintif mempunyai peluang kejayaan dalam tuntutannya untuk injunksi berkekalan di perbicaraan. Kes plaintif untuk satu deklarasi bahawa defendan telah menarik balik lesen secara sepihak tanpa memberikan pembicaraan adil kepada plaintif adalah tanpa merit dan ia difailkan semata-mata untuk melengah dan mengecewakan defendan daripada melaksanakan kewajipan berkanunnya. Berdasarkan fakta-fakta, plaintif telah gagal memenuhi ujian seperti yang dinyatakan dalam *Smith & Ors v Inner London Education Authority* [1978] 1 All ER 411, dalam ertikata tiada kelihatan peluang kejayaan dalam injunksi berkekalan di perbicaraan (lihat ms 523E, 530H–I).

(3) Sekiranya plaintif adalah sebuah syarikat yang bertanggungjawab, ia sepatutnya telah memaklumkan kepada anak guamnya tentang kedudukan lesen tersebut. Tambahan pula, plaintif harus bertindak dengan sikap berhati-hati dan mesti bertindak dalam lingkungan Undang-Undang Kecil PWP. Plaintif harus berwaspada dan tidak mengikat apa-apa kontrak dengan anak guam melainkan ia telah menjamin lesennya dengan defendan. Tingkahlaku plaintif dalam tidak mematuhi peruntukan undang-undang dan mengikat kontrak tanpa lesen yang sah dan berterusan merupakan kelakuan yang tidak berpatutan oleh sebuah syarikat yang bertanggungjawab. Plaintif telah gagal menunjukkan bahawa ganti rugi bukanlah remedi yang mencukupi oleh kerana ganti rugi boleh dikira dengan mudah, justeru itu relief berdasarkan injunksi patut ditolak (lihat ms 531C–E, 532F).

(4) Dalam kes ini, imbangan kesesuaian lebih berkecenderungan terhadap defendan yang hanya melaksanakan tugas di bawah statut tersebut. Plaintif telah menunjukkan sikap tidak hormat terhadap defendan dan lebih penting lagi, terhadap peruntukan undang-undang dalam negara (lihat ms 533A, C).]

Notes

For cases on licensing for signboard and advertisement, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 167–168.

Cases referred to

American Cyanamid v Ethicon Ltd [1975] 1 All ER 504 (refd)
Castro v Murray (1875) LR 10 Ex 213 (refd)

Cheah Cheng Lan v Heng Yea Lee [2001] 1 MLJ 433 (refd)
Chellapa a/l K Kalimuthu (suing as public officer of Sri Maha Mariamman Temple, Hicom, Shah Alam, Selangor) v Sime UEP Properties Bhd [1998] 1 MLJ 20 (refd)
Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17 (refd)
Dawkins v Prince Edward of Saxe Weimar (1876) 1 QBD 499 (refd)
Elias bin Mooin & Anor v Dato' Zainal Abidin bin Johari [1997] 5 MLJ 359 (refd)
Evans Marshall & Co Ltd v Bertola SA & Anor [1973] 1 All ER 992 (refd)
Francome & Anor v Mirror Group Newspapers Ltd & Ors [1984] 2 All ER 408 (refd)
Goh Joon v Kerajaan Negeri Johor & Ors [1998] 7 MLJ 621 (refd)
Johnson v Stephens & Carter Ltd & Golding [1923] 2 KB 857 (refd)
Metropolitan Bank v Pooley (1885) 10 App Case 210 (refd)
Morning Star Co-operative Society Ltd v Express Newspapers Ltd [1979] FSR 113 (refd)
Saw Seng Kee v Director of Lands & Mines; Penang & Ors, Teoh Han Che v Director of Lands & Mines, Penang & Ors [1987] 1 MLJ 80 (refd)
Shashitharan Pillay a/l Baskaran Pillay v Salleh bin Hussin & Anor [1995] 4 CLJ 265 (refd)
Smith & Ors v Inner London Education Authority [1978] 1 All ER 411 (folld)
Tan Suan Choo v Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 (refd)
Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd [1999] 2 MLJ 696 (refd)
United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (refd)
Veale v Warner (1669) 1 Wms Saund 575 (refd)
Yap Ea Teck v Yang Di Pertua Majlis Daerah, Kota Tinggi, Johor [1995] MLJU 55 (refd)

Legislation referred to

Advertisements (Federal Territory) By-Laws, 1982 by-laws 2, 5(1), 8(2), (3), 10, 14, 15
Local Government Act 1976 ss 2, 8, 9, 102, 107(4)
Rules of the High Court 1980 O 92 k 4
Specific Relief Act 1950 s 54(d)

CT Annathurai (*Hamzah Suleiman & Partners*) for the plaintiff.
Thangaraj Balasundram (*Thangaraj & Associates*) for the defendant.

Abdul Malik Ishak J: This judgment concerned two enclosures. One was encl 10 and the other encl 17.

Enclosure 10 was a summons in chambers filed by the defendant seeking for the following orders:

(a) that the ex parte order dated 24 February 2001 be set aside; A

(b) that damages incurred by the defendant be assessed by the senior assistant registrar and to be paid by the plaintiff;

(c) that the costs of this application be assessed and payable forthwith by the plaintiff to the defendant; and

(d) any other order or relief which this honourable court deems fit and proper. B

Whereas encl 17 was a summons in chambers filed by the plaintiff which sought for the following orders:

(i) an interim injunction restraining the defendant by himself, his servants or agents howsoever from removing, dismantling and/or demolishing the whole or any part of the neon billboard carrying the '*Malboro*' advertisement located on the front wall of the building at No 67, Jalan Sultan Ismail, Kuala Lumpur and No 127, Jalan Bukit Bintang, Kuala Lumpur pending the final disposal of this suit; C

(ii) the defendant be at liberty to apply to this honourable court to set aside the order of this court to be made in this application; D

(iii) such other orders which this honourable court deem fit and suitable; and

(iv) the costs of the application to be paid by the defendant to the plaintiff.

Enclosure 10 was dated 2 March 2001 and it was filed on the same date. The same would also be true for encl 17. E

Background facts

The defendant — Dato' Bandar Kuala Lumpur, is a local authority having conduct of the affairs of the city of Kuala Lumpur. Section 2 of the Local Government Act 1976 ('the Act') defines local authority in this way: F

> 'local authority' means any City Council, Municipal Council or District Council, as the case may be, and in relation to the Federal Territory means the Commissioner of the City of Kuala Lumpur appointed under s 3 of the Federal Capital Act 1960. G

Section 8 of the Act enacts as follows:

> The affairs of every local authority area shall be administered by a local authority established by and in accordance with this Act:
>
> Provided that where in the application of this Act to the Federal Territory there is any conflict between the provisions of this Act and the Federal Capital Act 1960, or the regulations made thereunder, the provisions of the Federal Capital Act 1960, shall prevail. H

Now, pursuant to s 102 of the Act, the Advertisements (Federal Territory) By-Laws, 1982 ('the AFT By-Laws') was applied to the Federal Territory. By Law 5(1) of the AFT By-Laws states that: I

> A person shall not exhibit or cause or permit to be exhibited any advertisement without a licence granted or renewed by the Commissioner under by-law 8(1).

An 'advertisement' is defined in by-law 2 of the AFT By-Laws in the following manner:

> 'advertisement' means any notification, posters, signboard, directive, sign, intimation or publication exhibited for the purpose of bringing to the notice of the public any article, product, production, trade, business, profession, firm, corporation, organization, institution, place, premises, event, activity or any other matter or information, on any hoarding, board, roof, wall, paling, fence, tree, frame, plate, cloth, bar, pillar, post, wire, casing, vehicle or any other structure or contrivance, or any part thereof, on, in or over any building, street, or place of public resort, or on or over any land, includes 'sky-sign' as defined in s 2 of the Act but does not include any election advertisement.

It goes without saying that the defendant had the authority to issue licences and did in fact, by virtue of the AFT By-Laws, issued licences to the plaintiff to exhibit the '*Marlboro*' advertisement at No 67, Jalan Sultan Ismail, Kuala Lumpur and at No 127, Jalan Bukit Bintang, Kuala Lumpur ('the said premise') for the years 1993, 1994, 1995, 1996, 1997, 1998 and 1999. The defendant issued various notices to the plaintiff and such notices culminated with the notice dated 19 February 2001 wherein the defendant notified the plaintiff to remove the '*Marlboro*' advertisement which was displayed at the said premise. The defendant really meant business. Alarmed by the turn of events the plaintiff filed a writ of summons together with the statement of claim as seen in encl 1 and there the plaintiff sought for, inter alia:

(i) a declaration that the defendant is not entitled to unilaterally withdraw the licence for the Billboard located on the front wall of the building at No 67, Jalan Sultan Ismail, Kuala Lumpur and No 120, Jalan Bukit Bintang, Kuala Lumpur without giving the plaintiff a fair hearing;

(ii) a declaration that the defendant has failed to comply with the principles of natural justice;

(iii) an order restraining the defendant by itself its servants or agents howsoever from removing, dismantling and/or damaging the Billboard located on the front wall of the building at No 67, Jalan Sultan Ismail, Kuala Lumpur and No 120, Jalan Bukit Bintang, Kuala Lumpur;

(iv) an order that the plaintiff is entitled to continue to display the advertisement on the said Billboard located on the front wall of the building at No 67, Jalan Sultan Ismail, Kuala Lumpur and No 120, Jalan Bukit Bintang, Kuala Lumpur;

(v) damages;

(vi) such other orders as this honourable court shall deem fit;

(vii) costs.

The plaintiff also filed an ex parte summons in chambers dated 23 February 2001 as seen in encl 5 and succeeded in obtaining an ex parte injunction dated 24 February 2001 (hereinafter referred to as the 'ex parte order'). The ex parte order had been extracted as seen in encl 6 and the crucial parts were these:

> *AND UPON HEARING* Mr CT Annathurai and Ms Mabel N James Counsel for the plaintiff and the plaintiff by its said counsel Mr CT Annathurai and

Ms Mabel N James, undertaking to abide by any order the court or a judge may hereafter make as to damages in case the court or a judge should hereafter be of the opinion that the defendant Dato' Bandar Kuala Lumpur shall have sustained any by reason of this order which the plaintiff ought to pay. *IT IS ORDERED AND DIRECTED* that the defendant Dato' Bandar Kuala Lumpur by himself, his agents or servants or otherwise howsoever, be restrained and an injunction is hereby granted restraining the defendant from removing, dismantling and/or demolishing the whole or any part of a neon lit advertising billboard bearing a '*Malboro*' advertisement located at the front of the contiguous building at No 120, Jalan Bukit Bintang, Kuala Lumpur and No 67, Jalan Sultan Ismail, Kuala Lumpur. *AND IT IS FURTHER ORDERED* that the defendant be at liberty to apply to this honourable court to set aside the order of this court to be made in this application.

The plaintiff too filed a summons in chambers dated 5 March 2001 as seen in encl 21 for the following orders:

(a) that the affidavit of Zainal Abidin Bin Md Zain that was affirmed on 2 March 2001 as seen in encl 13 which was filed in support of the application by the defendant by way of a summons in chambers dated 2 March 2001 as reflected in encl 10 for, inter alia, an order that the ex parte injunction dated 24 February 2001 be set aside, be expunged.

(b) that all the affidavits filed by the defendant should be affirmed by the defendant in person and not by any other officer.

(c) that the costs of this application be borne by the defendant and payable to the plaintiff.

(d) any other order which this court deems fit and fair.

Enclosures 10, 17 and 21 were fixed for hearing on 7 March 2001. On that day, this court ordered that encl 21 to be heard first and it would be followed by the joint hearing of encll 10 and 17. In due course encl 21 was heard and the decision was reserved to 29 June 2001. In order to maintain the status quo and in the interest of justice, the ex parte order was also extended to 29 June 2001. The defendant too was magnanimous in agreeing to the extension of the ex parte order. In regard to encl 21, a written judgment was delivered on 29 June 2001 where this court dismissed the application in encl 21 with costs. Unfortunately the written judgment has not been reported. Be that as it may, encll 10 and 17 were heard jointly and the decision was reserved to 29 December 2001 to enable the parties to put in their written submissions and once again the ex parte order was extended till 29 December 2001 with the concurrence of the friendly defendant.

The plaintiff is no respecter of the law. By way of an additional affidavit that was affirmed by Zainal Abidin bin Md Zain on 13 July 2001 and filed on the same date as seen in encl 32, it was deposed that the plaintiff had unilaterally brought down the '*Marlboro*' advertisement which is the subject matter of this suit as seen in encl 1 and also the subject matter of the present injunctive relief which forms part and parcel of the ex parte order in encl 6. The coloured photograph exhibited and annexed as exh 'ZA-12' to encl 32 certainly would be food for thought. That coloured photograph bore the date when that photograph was taken and it was 3 July 2001. The structure

A that remained did not add to the aesthetic value to the locality. It is indeed an eyesore. It was deposed that the new development warranted the ex parte order in encl 6 which was extended to be dissolved forthwith.

Another alarming new development was this. By way of an additional affidavit (II) that was affirmed by Zainal Abidin Bin Md Zain on 8 August
B 2001 and filed on the same date as seen in encl 34, it was deposed that the plaintiff, without adhering to the provisions of the law particularly the AFT By-Laws, had without a licence proceeded on 1 August 2001 to display the '*Giordano*' advertisement on the structure of the said premise. The coloured photograph exhibited and annexed to encl 34 as exh 'ZA-14' showed the presence of the '*Giordano*' advertisement.

C By way of a summary, it may be said that:

(1) the ex parte order in encl 6 was obtained to restrain the defendant by himself his servants or agents from removing, dismantling and/or demolishing the whole or any part of the neon Billboard carrying the '*Marlboro*' advertisement on the said premise and encl 6 was dated
D 24 February 2001;

(2) the ex parte order was extended till 29 December 2001 by this court;

(3) on 3 July 2001, the '*Marlboro*' advertisement was brought down by the plaintiff and the structure became empty and this was done unilaterally by the plaintiff;

E (4) it seems that the ex parte order and the extension of the same order until 29 December 2001 is designed to protect the plaintiff but not the defendant, but surely such protection must end on 3 July 2001 when the very rubric of the writ of summons and the ex parte order has fallen flat to the ground;

F (5) what is there to restrain the defendant when the '*Marlboro*' advertisement was brought down not by the defendant but rather by the plaintiff?;

(6) was the plaintiff indirectly thumbing at the ex parte order and the extension of that ex parte order until 29 December 2001 by arrogantly removing the '*Marlboro*' advertisement unilaterally?; and
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(7) On 1 August 2001, the plaintiff displayed the '*Giordano*' advertisement on the structure of the said premise without any licence issued by the defendant.

The affidavits in encll 32 and 34 added new complexions to the whole case.
H The plaintiff was certainly taking advantage of the ex parte order that had, in the meantime, been extended to 29 December 2001. Would that be fair to the defendant? Would it not be correct to say that since the subject matter of the ex parte order is no longer there, order in terms of encl 10 should be granted for the benefit of the defendant and the plaintiffs encl 17 should be dismissed with costs?

I In *Chellapa a/l K Kalimuthu (suing as public officer of Sri Maha Mariamman Temple, Hicom, Shah Alam, Selangor) v Sime UEP Properties Bhd* [1998] 1 MLJ 20, a decision of Shankar JCA (as he then was) sitting

alone in the Court of Appeal, is certainly worth looking into. There the appellant (plaintiff) filed a summons in chambers for an ex parte injunction against the respondent (defendant) which was granted by the judge on 20 December 1996. Notice of the ex parte injunction was given to the respondent (defendant) on 26 December 1996. The respondent (defendant) then applied to set aside the ex parte injunction. The judge granted the application on 30 June 1997. The appellant (plaintiff) applied on an ex parte basis to the Court of Appeal for a stay of all proceedings incidental to the order of the High Court until the finalization of the appeal. The Court of Appeal granted the stay because:

(1) there was a very real danger that the appeal may be nugatory;

(2) there was a serious question to be tried;

(3) that the appellant (plaintiff) had a legitimate expectation which the Court of Appeal should protect.

In the case, Shankar JCA at p 29 of the report gave his reasons for allowing the stay. It was like this:

> The primary consideration which led me to grant the application for a limited stay till the sitting of the full court is that Cik Goonting was unable to indicate whether Sime would be prepared to hold back in the meantime notwithstanding that the order made on 30 June 1997 had not been extracted. There was thus a very real danger that the appeal may be rendered nugatory. There is also considerable force in En Karpal Singh's submission that the injunction made on 20 December 1996 was inter partes because the first defendant had been served. If so, it is arguable that the court had no jurisdiction to set it aside. (But see MLJ's *Malaysian Court Practice* para 32.5.2. and the cases cited. It seems that the order was not perfected if it was still sitting in the Registry). This temple has been there since 1891. The Exco and Sime were aware that when conversion was applied for, the state authority had imposed a special condition protecting the status and situation of the temple. There is a serious question to be tried as to whether the plaintiff has a legitimate interest and expectation which this court should protect. I took the liberty of directing the attention of both counsel to my judgment in *Damansara Jaya Sdn Bhd v Penghuni-Penghuni Kuil Muneswaran Allayam* (Originating Summons No 24–27–92, High Court, Shah Alam). There are many similarities between that case and the problems here. The decision of the Supreme Court in *Bohari bin Taib & Ors v Pengarah Tanah dan Galian, Selangor* [1991] 1 MLJ 343 is not irrelevant. Finally, I think it desirable to draw the attention of all concerned to s 7(1) of the Specific Relief Act 1950, which forbids forcible evictions without a court order.

Of course, factually speaking, *Chellapa* was different from the present case. In *Chellapa*, the temple was there since 1891 and both the Exco and Sime were aware that when the state authority approved the conversion, the state authority had imposed a special condition that was meant to protect the status and the location of the temple. Here before me, the ex parte order that was granted on 24 February 2001 and extended with the concurrence of the defendant to 29 December 2001 must surely fall flat to the ground because of the new developments as alluded to in encll 32 and 34. *Chellapa*'s case was in regard to a stay whereas here it was not the case.

The plaintiff was not happy with the additional affidavit of Zainal Abidin bin Md Zain that was affirmed on 13 July 2001 as reflected in encl 32 and the learned counsel for the plaintiff submitted that this court had directed that no new affidavits ought to be filed by both parties. The plaintiff too through its counsel reserved its right to reply to encl 32. It seemed that the plaintiff also took exception to the additional affidavit (II) of Zainal Abidin Bin Md Zain in encl 34 for the same reason and the plaintiff too reserved its right to reply to encl 34.

In response, this was what the defendant said through its learned counsel:

(1) even without the assistance of the affidavits in encll 32 and 34, the plaintiff's application for an injunction ought to be dismissed.

(2) the affidavits in encll 32 and 34 were filed to show to this court the abuse which the plaintiff perpetrated and the character of the plaintiff who was bent in deliberately disregarding any provision of the law.

(3) when this court directed that no new affidavits ought to be filed, this court was cognizant of the then existing facts which prompted this court to grant the ex parte order and to extend it until 29 December 2001; and when this court extended the ex parte order it was done in order to preserve the status quo pending the hearing of the inter partes on the merits of the plaintiff's application for an injunction.

(4) that the ex parte order and its extension thereof relate to the '*Marlboro*' advertisement but on 5 July 2001 that advertisement was taken down by the defendant and the structure remained on the said premise.

(5) that on 1 August 2001, the '*Giordano*' advertisement was put up by the plaintiff.

(6) that the change in circumstances as alluded to in (4) and (5) would be relevant considerations for the grant or refusal of the injunction which the plaintiff sought which was confined to the '*Marlboro*' advertisement.

(7) that the change in circumstances as alluded to in (4) and (5) only appeared after 29 June 2001 when this court gave its written decision in regard to encl 21.

(8) the stand of the defendant was that the plaintiff be at liberty to reply to encll 32 and 34 but all the same, the defendant submitted that the two coloured photographs were self explanatory and that no further elaboration was needed in regard to the present status of the advertisements. Put shortly, the defendant was saying through its counsel that there was no necessity to file affidavits to counter encll 32 and 34. Adopting the speech of Gopal Sri Ram JCA in *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 especially at pp 32–33 of the report:

> Of course, procedurally speaking, there is no power in the court to direct a party to affirm and file an affidavit. Parties to a litigation have conduct of their case and the court cannot compel either side to file affidavits (see *Minister of Labour, Malaysia v Sanjiv Oberoi* [1990] 1 MLJ 112).

> There may, of course, be good reasons for the absence of an affidavit from the particular decision-maker, eg because he is dead. Or it may be a case where an affidavit from the decision maker is unnecessary. Thus, a Chairman of the Industrial Court is not expected to file an affidavit in rebuttal to an application to quash his award.
>
> But, where no cogent reasons are proffered by way of admissible evidence for the absence of such an affidavit, the general rule will apply with full force. Consequently, where allegations on affidavit are unrebutted by the party against whom they are made, a court is entitled to conclude that those allegations have been accepted. See *Rama Chandran*, per Edgar Joseph Jr FCJ at p 229.

Confronted with the two coloured photographs in encll 32 and 34, what could the plaintiff possibly say if the plaintiff seriously contemplate to respond to encll 32 and 34? Perhaps to borrow the word of Gopal Sri Ram JCA in the abovementioned case, it was '*unnecessary*' for the plaintiff to respond to encll 32 and 34.

(9) that the plaintiff had abused the process of the court by asking for the ex parte order to be extended till 29 December 2001 when in fact the plaintiff had two ulterior motives:

(a) to take down the '*Marlboro*' advertisement; and

(b) to put up the '*Giordano*' advertisement.

The arguments of the defendant, through its learned counsel, were sound and it added weight to the defendant's application in encl 10.

Abuse of process

In regard to an abuse of process, I have this to say. Since time immemorial, the courts have exercised its powers under the inherent jurisdiction by summary process to terminate proceedings which were frivolous or vexatious or which were an abuse of the process (*Veale v Warner* (1669) 1 Wms Saund 575; and *Johnson v Stephens & Carter Ltd & Golding* [1923] 2 KB 857). Way back in 1875, the Court of the Exchequer in the case of *Castro v Murray* (1875) LR 10 Ex 213 — which was an action against the clerk of the petty bag office in the Court of Chancery for refusal to seal a writ of error, decided that it had power to summarily dismiss an action as being an abuse of the process of the court. The Queens Bench Division in 1876 in the case of *Dawkins v Prince Edward of Saxe Weimar* (1876) 1 QBD 499 — which was an action against members of a military court of inquiry for damages for conspiracy, dutifully followed the decision of *Castro v Murray*. Blackburn J, delivering the judgment in *Dawkins v Prince Edward of Saxe Weimar* aptly said at p 502 of the report:

> Have we, although we see the action is utterly groundless, a right to stop it summarily?

As I see it, once it becomes apparent that the abuse of process becomes a ground for the court to terminate the proceedings summarily under its inherent jurisdiction, then it becomes a solid basis for the court to invoke its

inherent powers. At the local scene, the inherent powers of the court finds its way in the Rules of the High Court 1980 ('the RHC') as per O 92 r 4 thereof which states as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

Generally speaking, the process of the court must be used properly, honestly and in good faith and it must not be abused. That must surely be the best way to describe the meaning of the term 'abuse of process'. The court will certainly not allow itself to be misused. The court will certainly ensure that its machinery will not be used as a means of vexation or even oppression. It is to prevent the misuse of the legal machinery that the court must be vested with the power to intervene summarily. Once an abuse of process has been detected, the court must intervene to stay or even to dismiss the proceedings and this would be the very essence of justice (see the speech of Lord Blackburn in *Metropolitan Bank v Pooley* (1885) 10 App Cas 210). The summary process of the court must be vigorously applied to prevent frivolous, vexatious or groundless litigation.

It is an abuse of process where the proceedings are frivolous or vexatious and this would be the typical situation in any given case.

Enclosure 10

This was a case where the ex parte order had automatically lapsed at the end of 21 days from the date on which it was granted. This was a case where the ex parte order was extended to 29 June 2001 to enable this court to deliver its decision in regard to encl 21 and that extension was with the magnanimous gesture on the part of the defendant. This was also a case where the ex parte order was extended to 29 December 2001 to enable this court to deliberate and adjudicate on encll 10 and 17 and that extension was also with the concurrence of the gallant defendant.

It must be borne in mind that the defendant had promptly filed encl 10 on 2 March 2001 before the expiry of the ex parte order. In my judgment, the defendant was entitled to proceed with the hearing of encl 10 notwithstanding the provisions of O 29, r 1 (2B) of the RHC which says:

> Unless sooner revoked or set aside, an interim injunction obtained on an *ex parte* application shall automatically lapse at the end of 21 days from the date on which it is granted.

I am fortified in my view on the strength of the Court of Appeal case of *Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696, where NH Chan JCA speaking for the Court of Appeal had this to say (see pp 699–700 of the report):

> In our judgment, we are of the view that the court below should not have made short shrift of the defendant's application. Since the order had already lapsed, it is all the more incumbent on the court, upon application made by the aggrieved party (which in this case is the defendant), to have the mandatory

order set aside. Otherwise, we would be faced with the invidious position of seeing contempt proceedings being brought against the defendant for not complying with an order that had lapsed.

Proceeding further, I must say that the ex parte order was granted 'until the disposal of this suit' and the plaintiff would continue to display the advertisement — not of '*Marlboro*' as envisaged in the ex parte order and as envisaged in the writ of summons and the statement of claim, but rather of '*Giordano*'. Working on the assumption that the '*Marlboro*' advertisement was still there, the defendant was entitled to move this court to set aside the ex parte order and to claim for damages (*Elias bin Mooin & Anor v Dato' Zainal Abidin bin Johari* [1997] 5 MLJ 359).

An injunction cannot be granted against the defendant

It was argued that as a local authority, the defendant is a department of the Government of Malaysia and thus an ex parte interlocutory injunction ought not to be granted. Reliance was placed on the case of *Yap Ea Teck v Yang Di Pertua Majlis Daerah, Kota Tinggi, Johor* [1995] MLJU 55, and this case too can be found in the CLJ legal network of cases. There the court said:

> The defendant here is the President of MDKT and in the discharge of his varied duties he may not agree with the other Councillors as to the exercise of any of his powers or of the powers of the local authority and, if this situation arises, the President of MDKT shall refer the matter to the Menteri Besar of Johor Bahru whose decision thereon shall be final and binding on the local authority (see s 10(7) of the Local Government Act 1976. MDKT by definition under s 2 of the Local Government Act 1976 is said to be a local authority. For the administration of local government, it is the state authority in consultation with the Minister and the Secretary of the Election Commission, may by notification in the Gazette declare and determine the status of local authority areas (see s 3 of the Local Government Act 1976. The Public Authorities Protection Ordinance 1948 applies to any action, suit, prosecution or proceeding against any local authority or against any councillor, officer, employee, servant or agent of any local authority in respect of any act, neglect or default done or committed and this is provided for under s 124 of the Local Government Act 1976. Finally, to clinch the position of the President MDKT as a public servant, it is found in s 126 of the Local Government Act 1976 which enacts as follows:
>
> > 'The Commissioner of the City of Kuala Lumpur, Mayor or President, Councillor, officers or employees of every description shall be deemed to be public servants within the meaning of the Penal Code.'
>
> By its very name 'Local Government Act 1976, one can easily identify the local authority as defined under s 2 thereof to be and to come within the scope of s 54(d) of the Specific Relief Act 1950, ie '... any department of any Government of Malaysia ...' and, consequently, perpetual injunction sought for against the President of MDKT should be dismissed forthwith with costs as it is barred by the section of the Specific Relief Act 1950. With respect, I do not subscribe to *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 for three simple reasons. Firstly, the President of MDKT is cited here by his office in his official designation as a defendant in this originating summons and by virtue of s 126 of the Local Government Act 1976 he is

A deemed to be a public servant within the meaning of the Penal Code and by necessary inference he is also governed by the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. As MDKT is a product of the Local Government Act 1976, it is a government department and remains so to this day. Secondly, all local authorities established under the Local Government Act 1976 have not been privatized by the Government and to this day it remains as such unlike Lembaga Letrik Negara which has been privatized and is now popularly known as TEN. Thirdly, *Tan Suan Choo*'s case dealt with an interim/interlocutory injunction pending hearing and finalization of the suit. Whereas here, it is a permanent injunction that is sought for and no suit has been filed.

Lim Kit Siang's case lays down the now classic rule that no injunction could be issued against the Government or its officers directly or indirectly. The *American Cyanamid*'s [1975] 1 All ER 504 requirement 'of a serious question to be raised' or the *Smith* (*Smith v Inner London Education Authority* [1978] 1 All ER 411) requirement of 'a real prospect of succeeding' when applied to the facts of this case cannot help the plaintiff at all. I fail to see how a court of law would restrain the defendant, the President of MDKT from issuing the CFOs' to the completed houses in Taman Ramunia as the plaintiff himself comes to court with dirty hands (his vendetta mission against the other directors of Sejagat). It is now trite law that the remedy of an injunction is equitable in nature and, being equitable, the popular maxim that he who comes to equity must come with clean hands aptly applies to the plaintiff here.

I venture to proceed a step further. Even assuming there is a serious question to be tried or the plaintiff has a real prospect of succeeding, he must show that damages would be an adequate remedy. But alas, the plaintiff has not done that or even made an attempt to do that. In my judgment, on the balance of convenience, I would regard the wide public interest of housing the buyers of Taman Ramunia and giving them the CFOs' as promised by MDKT as decisive and the permanent injunction sought for was refused. For these reasons, I dismissed prayers (1) and (2) of encl 4 with costs.

In *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323, a decision of the High Court of Penang, the learned judge after examining the relevant provisions of the Act concluded at p 325 of the report:

> My conclusion from an examination of the above provisions of the Act is that Local Authorities are significantly free from government control and do not exercise government functions.
>
> Lastly, Mr Karpal Singh for the plaintiff referred me to a number of cases decided in India which show that permanent injunctions have been granted against municipalities notwithstanding s 56(d) of the Indian Specific Relief Act 1877, which is equivalent to our s 54(d). Examples of these are: *Raja Ram v State of Uttar Pradesh* AIR 1963 All 449; *Mohd Shafi v Sialkot Municipality & Anor* AIR 1940 Lah 451; Municipal Committee, *Sialkot v Jagat Singh* AIR 1936 Lah 572; *Municipal Board, Manglaur v M Maharaj* AIR 1965 SC 1147. I appreciate, however, that in none of these cases was the point taken that a municipality is not a department of Government and it appears to have been accepted by the parties that the ban contained in s 56(d) had no application. These cases are not therefore to be taken as authorities for the proposition that municipalities are not a department of Government. As Lord Halsbury said in *Quinn v Leathem* [1901] AC 495 at p 506: '... a case is only an authority for what is actually decides.'

but these conclusions and observations were not followed by *Yap Ea Teck*. From the excerpts of the judgment of *Yap Ea Teck* as reproduced above, cogent reasons were advanced to show that a local authority is, in law, a department of the government of Malaysia. I venture to say that a local authority is not free from government control. In this direction reference to s 9 of the Act would be ideal. That section says that:

> Power of state authority to issue directions
>
> (1) The state authority may from time to time give the local authority directions of a general character, and not inconsistent with the provisions of this Act, on the policy to be followed in the exercise of the powers conferred and the duties imposed on the local authority by or under this Act in relation to matters which appear to the state authority to affect the interests of the local authority area, and the local authority shall as soon as possible give effect to all such directions.
>
> (2) The local authority shall furnish the state authority with such returns, accounts and other information with respect to the property and activities of the local authority as the state authority may from time to time require.

and s 2 of the Act defines 'state authority' in this way:

> 'State authority' means:
>
> (a) in relation to the States of West Malaysia, the Ruler-in-Council or Governor in-Council of a State and includes in Negeri Sembilan the Yang di-Pertuan Besar acting on behalf of himself and the Ruling Chiefs; and
>
> (b) in relation to the Federal Territory, the Minister charged with the responsibility for local government.

That being the case the defendant would be subservient to the 'Minister charged with the responsibility for local government' and, as a government department, the defendant cannot be subject to an injunction be it interim or perpetual. Of relevance to the occasion would be s 54(d) of the Specific Relief Act 1950 which enacts as follows:

> An injunction cannot be granted —
>
> (d) to interfere with the public duties of any department of any Government in Malaysia, or with the sovereign acts of a foreign Government.

and it clearly bars an injunction from being issued against any department of any Government in Malaysia whether that injunction is temporary or perpetual. In fact, both the learned counsel having conduct of the case in *Tan Suan Choo* were of the view that s 54(d) of Specific Relief Act 1950 would apply to both perpetual and temporary injunctions but the learned judge disagreed. At p 324 of the MLJ reporting in the case of *Tan Suan Choo*, the learned judge had this to say:

> Before passing to my next ground for over ruling the preliminary objection I should perhaps mention that the point about s 54(d) having application to perpetual injunctions only was raised by me in the course of the argument and both counsel were of the view that it applied to temporary injunctions as well. With respect, for the reasons given, I cannot agree.

It is now apparent that the restricted meaning to s 54(d) of the Specific Relief Act 1950 that was assigned by the learned judge in *Tan Suan Choo* was, indirectly, not followed by the then Supreme Court in the case of *Government of Malaysia v Lim Kit Siang, United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12 (SC). At p 20 of the report, Salleh Abas LP had this to say:

> Refusal to grant the injunction in this case is also consistent with paras (d) and (k) of s 54 of the Specific Relief Act in that no injunction can be granted 'to interfere with the public duties of any department of any Government' nor can it be granted 'where the applicant has no personal interest in the matter'. Personal interest here must surely mean legal interest and not merely political interest.

The upshot of it all would be this. Being a department of the government, no injunction whether interim or perpetual can be granted against the defendant. That being the case, encl 17 should rightly be dismissed and an order in terms be granted in regard to encl 10. In the event I am wrong in the approach as adopted by me, I must proceed further to show that an injunction ought not to be granted against the defendant.

What are the principles governing the granting of an injunction against a local authority?

Leaving aside, for the moment, the statutory prohibition as framed in s 54(d) of the Specific Relief Act 1950 and other relevant statutes as alluded to earlier, the courts in England and Malaysia have adopted the stand that an injunction would only be granted against a local authority or a public authority when the plaintiff has 'a real prospect of succeeding in his claim for a permanent injunction at the trial'. The requirement of the case of *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 'of a serious question to be raised' has no relevance to the grant of an interlocutory injunction against a local authority. In this context, Lord Denning MR in *Smith & Ors v Inner London Education Authority* [1978] 1 All ER 411 (CA) had this to say at p 418 of the report:

> Lastly, a word about *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396 which we have so often. Counsel for the authority said that it should be confined to actions between parties in private law; and should not be extended to cases against local authorities in public law. I see some merit in this suggestion, especially in view of *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128, [1975] AC 295; and also when one is considering the respective compensation in damages. But without going into detail, I am of opinion that a local authority should not be restrained, even by an interlocutory injunction, from exercising its statutory powers or doing its duty towards the public at large, unless the plaintiff shows that he has a 'real prospect of succeeding in his claim for a permanent injunction at the trial' [1975] 1 All ER 504 at p 510, [1975] AC 396 at p 408. In this case I fear that I see no real prospect of the parents succeeding at the trial. To grant an interlocutory injunction in the circumstances would do more harm than good. It would only put off the evil day for a year.

Brown LJ writing a separate judgment in the same case posed a question at p 419 of the report:

> The first question is whether the plaintiffs have satisfied the first requirement laid down by the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 at p 510, [1975] AC 396 at pp 407–408: is their action not frivolous or vexatious? Is there a serious question to be tried? Is there a real prospect that they will succeed in their claim for a permanent injunction at the trial? The first two questions were clearly intended to state the same test, because they are joined by the phrase 'in other words', and the third cannot, I think, have been meant to state any different one.

and his Lordship then concluded it in this way (see p 422 of the report):

> The result is that I am driven to the conclusion that the plaintiffs have no real prospect of succeeding in their claim for a permanent injunction if this case goes to trial.
>
> The question of balance of convenience therefore does not arise. Megarry VC came to the 'clear conclusion that the balance of convenience favours the grant of the injunctions claimed and not their refusal'. He only considered the balance of convenience as between the plaintiffs and the authority, but I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed. I think this is an example of the 'special factors' affecting the balance of convenience which are referred to by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 at p 511, [1975] AC 396 at p 408. Looked at in this way, I think that the balance of convenience, if it arose, would be very finely balanced even if Mrs Cocks's (Mrs Cocks was a member of a parents' consultative committee set up by the authority) affidavit may be open to the criticisms made by Mr Hutton (The headmaster of St Marylebone Grammar School). In these circumstances, I think the court could and should take into account that the strength of the authority's case is in my judgment disproportionate to the strength of the plaintiff's case, for the reasons already given (see *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 at p 511, [1975] AC 396 at p 409). If the question of laches did arise, I should agree with Megarry VC. But on the whole of the case I agree that the appeal must be allowed.

Geoffrey Lane LJ in the same case observed in a separate judgment at p 426 of the report:

> Indeed the whole purpose of the decision in that case was to avoid the necessity of the court trying the case in advance on inadequate facts and argument and to provide rules designed to ensure that a fair balance was maintained between the parties until trial. The present case is dissimilar from *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396 in almost every particular. There is no material dispute about the facts. The authority have contended that the principles in that case are not appropriate to cases where the issue is the propriety or otherwise of the exercise by a public authority of its statutory powers and they pray in aid the decision of their Lordships in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128, [1975] AC 295, and particularly the speech of Lord Reid [1974] 2 All ER 1128 at pp 1134–1135, [1975] AC 295 at pp 341–342. The plaintiffs on the other hand have argued that they can show they

A have 'a real prospect of succeeding' at the eventual trial. As a result of these various contentions it has been necessary for each side to deploy in full all the legal arguments and for this court to give to them such mature consideration as it has been able. Consequently, to apply the rules laid down by Lord Diplock (which are designed to circumvent the necessity of deciding disputed facts or determining points of law without hearing sufficient argument) would B in the circumstances seem to be inappropriate. The outcome of the full argument applied to the undisputed facts is to my mind clear. The authority succeeds and the injunction should be discharged. In any event, if one *does pose the American Cyanamid* [1975] 1 All ER 504 at p 510, [1975] AC 396 at p 408 question, namely: do the plaintiffs have a real prospect of succeeding in the eventual trial?, the answer is No.

C Applying these salient legal niceties of these learned judges in the *Smith*'s case, the question to pose would be: whether the plaintiff here has 'a real prospect of succeeding in the eventual trial?', and the answer would definitely be in the negative. It must be recalled that the affidavits in encll 32 and 34 showed that the '*Marlboro*' advertisement had been substituted by D the plaintiff with the '*Giordano*' advertisement and I did say that it was 'unnecessary' for the plaintiff to respond to these two enclosures since the two coloured photographs clearly showed that the circumstances have changed. When the ex parte order was granted and extended on 29 June 2001 to 29 December 2001, this court was only concerned about the '*Marlboro*' advertisement. But with these changed circumstances, it would E be pointless to extend the ex parte order 'pending the final disposal of the suit' (see prayer (i) of encl 17). It must be borne in mind that the 'suit' hinged on the '*Marlboro*' advertisement and not the '*Giordano*' advertisement. That being the case, it was part and parcel of my judgment that the plaintiff here has 'no real prospect of succeeding' in his claim 'for a permanent injunction if this case goes to trial.' Incidentally, the speeches of F their Lordships in the Smith's case were followed by our judges in the following cases:

(1) *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* — see p 327 of the MLJ reporting at p 327 left column at para D right up to right column at para E;

G (2) *Saw Seng Kee v Director of Lands & Mines; Penang & Ors, Teoh Han Che v Director of Lands & Mines, Penang & Ors* [1987] 1 MLJ 80;

(3) *Yap Ea Teck v Yang Di Pertua Majlis Daerah Kota Tinggi*; and

(4) *Shashitharan Pillay a/l Baskaran Pillay v Salleh Bin Hussin & Anor* [1995] 4 CLJ 265.

H

With the changed circumstances there was certainly no real prospect of success at the trial. It would be appropriate, in the circumstances, to allow encl 10 and to dismiss encl 17 with costs.

I *An examination of the statement of claim*

It is ideal to proceed on this course of action in order to ascertain whether there is a cause of action against the defendant. I have in the early part of

this judgment reproduced in verbatim the various reliefs which the plaintiff sought extending from prayer (i) to prayer (vii). It would appear that the plaintiff was challenging the decision of the defendant 'to unilaterally withdraw the licence without giving the plaintiff a fair hearing.' But, unfortunately, the statement of claim as presently worded did not state the detail nor particularize the licence that was withdrawn where the plaintiff was said not to have been given a fair hearing. It must be emphasized that the licence that was issued by the defendant under the Act and the AFT By-Laws would only be valid for 12 months.

Section 107(4) of the Act enacts as follows:

> A licence shall be valid for a period not exceeding twelve months.

By-Laws 8(2) and (3) of the AFT By-Laws state as follows:

> (2) Application for renewal of a licence shall be made before the date of expiry of the licence and shall be accompanied by payment of the licence fee as prescribed in the First Schedule.
>
> (3) A licence shall remain in force, unless sooner suspended or cancelled, until the 31 December next following the date of commencement of such licence.

Thus, it is clear that the life span of a licence is for a period of 12 months. It is renewable on a yearly basis and it would remain in force until 31 December. That being the case, it would be crucial on the part of the plaintiff to plead the year wherein the licence was withdrawn by the defendant unilaterally without giving the plaintiff a fair hearing.

In withdrawing the licence, was the plaintiff entitled to be heard? By Law 8(4) of the AFT By Laws states as follows:

> The Commissioner may, without giving any reason, refuse to issue or renew a licence.

and this would mean that the plaintiff was not entitled to be heard when the defendant refused to renew the licence? It appears to be so and this would shackle the plaintiff further.

A submission was made that the plaintiff failed to plead the year of the licence that was withdrawn for the simple reason that no licence was ever issued to the plaintiff for the years 2000 and 2001. That being the case, the issue of unilaterally withdrawing the licence did not arise at all. The end result would be this: that the purported declaration that was sought by the plaintiff to declare the withdrawal of an unspecified licence was a mere hypothetical. In *Goh Joon v Kerajaan Negeri Johor & Ors* [1998] 7 MLJ 621, I had occasion to say at p 630 of the report:

> That the court may refuse to entertain declaratory proceedings where there is no dispute at all, or where the matter is highly hypothetical or where it involves future rights.

Continuing at p 632 of the report, I had this to say:

> It is germane to summarize the law in a compendious manner. The following would suffice:

A (1) The court will be reluctant to decide academical or hypothetical questions (*Tindall v Wright* (1922) 127 LT 149; *Re Barnato decd; Joel v Sanges* [1949] Ch 258).

(2) The court will not grant a declaration to a plaintiff whose claim is too indirect and insubstantial (*Thorne Rural District Council v Bunting* [1972] Ch 470; [1972] 1 All ER 439).

B (3) No declaration would be granted by the court where there is no breach and no threat or intention to commit a breach of an agreement (*Mellstrom v Garner & Ors* [1970] 2 All ER 9; [1970] 1 WLR 603).

(4) A declaration will not be made where it would serve no useful purpose (*Mellstrom v Garner*).

C Paragraph 6 of the statement of claim specifically averred that:

> The Licensing Department of the defendant has issued licences for the said Billboard for the years 1993, 1994, 1995, 1996, 1997, 1998 and 1999.

For seven long years, the defendant had issued licences on a yearly basis to the plaintiff. But the statement of claim was not that perfect. The following D material fact was not pleaded at all: that no licences were issued for the years 2000 and 2001, and with this drawback the issue of the withdrawal of a licence by the defendant was a non-issue. In the first place, the issue did not arise at all. The plaintiff sought to improve the statement of claim by affidavit evidence but this was a perilous course of action to undertake. In E *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 (FC), Raja Azlan Shah Ag LP (as His Majesty then was) aptly said at p 207 of the report:

> This omission is surprising, to say the least, and we cannot but observe that any defect or omission in the Statement of Claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co v Parr* (1892) 2 QB 14 where F Mathew J, said that: 'it is most important that a defendant should know from the writ what the exact claim against him is'.

No licences issued for the years 2000 and 2001

The AFT By-Laws carry the provisions for the issuance of licence and the G power of enforcement. It would be ideal to reproduce them in succession:

By-Law 5 of the AFT By-Laws reads as follows:

(1) A person shall not exhibit or cause or permit to be exhibited any advertisement without a licence granted or renewed by the Commissioner under by-law 8(1).

H (1A) The Commissioner may limit the number of advertisements to be exhibited, including the number of structures for such advertisements for the purpose of granting or renewing the licence.

(1B) The Commissioner may impose any condition he deems fit in a licence issued under these By-laws.

I By-Law 8 of the AFT By-Laws is worded in this way:

(1) The Commissioner may grant or renew a licence to exhibit the advertisement in such form as the Commissioner may determine.

(2) Application for renewal of a licence shall be made before the date of expiry of the licence and shall be accompanied by payment of the licence fee as prescribed in the First Schedule.

(3) A licence shall remain in force, unless sooner suspended or cancelled, until the 31 December next following the date of commencement of such licence.

(4) The Commissioner may, without giving any reason, refuse to issue or renew a licence.

By-Law 10 of the AFT By-Laws states as follows:

(1) The Commissioner may, without giving any reason, at any time revoke any advertisement licence.

Provided that the Commissioner shall give a written notice to the licensee two weeks before making such revocation.

(2) Where a licence is revoked the person exhibiting the advertisement shall remove the advertisement to which the licence relates within fourteen days from the date of revocation.

(3) Compensation shall not be payable to any person upon the revocation of a licence.

Then there is By-Law 14 of the AFT By-Laws which is worded in this way:

(1) The Commissioner may order the summary removal or erasure of any advertisement, including any structure erected specially for the advertisement, exhibited without a licence or in contravention of any of these By-Laws.

(2) The Commissioner or his officers may enter into any premises at all reasonable times and execute the removal or erasure of any advertisement if the order of removal or erasure has not been complied with.

(3) The expenses incurred for the removal or erasure under paragraph (2) shall be borne by the person exhibiting the advertisement, and the Commissioner may deduct such expenses from any money due to that person under by-law 11.

(4) The Commissioner may, for the purpose of repairing, repainting or cleaning any place or structure, remove any advertisement, even though the licence for such advertisement is still valid and no refund shall be made to the licensee in respect of such licence.

(5) The Commissioner shall not be held responsible for any damage done by him or his employees in the course of carrying out the provisions of this by-law.

Finally, By-Law 15 of the AFT By-Laws stipulates as follows:

Any person who contravenes any of these By-laws or any condition in a licence, or any notice or order of the Commissioner, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand ringgit or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.

These By-Laws show in no uncertain terms the wide powers of the defendant in regard to the licensing of advertisements, the grant or renewal of a licence, the revocation of a licence and the removal of advertisements. As far as the

city of Kuala Lumpur is concerned, the defendant holds the trump card when it comes to issuing a licence to advertise in a particular location within the city precinct of Kuala Lumpur. A striking example of the format of the licence issued by the defendant can be seen in exh 'ZA-1' of encl 9.

The series of correspondences between the parties showed that the defendant had informed the plaintiff that the licence for the '*Marlboro*' advertisement would only be issued until 31 December 1999 after considering the appeals made by the plaintiff. These facts can be gleaned from the affidavits of Zainal Abidin Bin Md Zain in encl 9 at exhs marked as 'ZA-3', 'ZA-4', 'ZA-5', 'ZA-6', 'ZA-7', 'ZA-8', 'ZA-9', 'ZA-10', and 'ZA-11', and in encl 12 at exhs marked as 'ZA-12', 'ZA-13', 'ZA-14', 'ZA-15, 'ZA-16', and 'ZA-17'. I do not propose to reproduce all these correspondences as they would take up a lot of printing space. Suffice for me to summarize the salient facts that appeared from these correspondences:

(1) That the plaintiff's licence for the year 1998 for the '*Marlboro*' advertisement was not renewed and the plaintiff was requested to submit a fresh application.

(2) After several meetings, the approval for the '*Marlboro*' advertisement was only given until 31 December 1999.

(3) After the meeting on 12 December 1998, the licences for the years 1998 and 1999 were issued.

(4) The plaintiff continued to advertise the '*Marlboro*' advertisement after 31 December 1999 and by notice dated 23 August 2000, the defendant had notified the plaintiff to remove the '*Marlboro*' advertisement. It must be stressed that that notice was not a notice to cancel a licence but rather a notice to dismantle and remove the '*Marlboro*' advertisement because there was no licence for the year 2000.

(5) The plaintiff by letter dated 14 September 2000 applied for approval to 'memasang visual baru *Marlboro*' and by letter dated 21 September 2000 the defendant approved 'untuk memasang iklan baru *Marlboro* Dunia Sukan'. It must be emphasised that the approval did not amount to granting a licence under the AFT By-Laws. The format of a licence as alluded to earlier can be seen in exh 'ZA-1' of encl 9.

Chan Loy Kim affirmed an affidavit in encl 19 on 5 March 2001 which was filed on the same date and that affidavit was affirmed on the same date. That affidavit was damaging to the plaintiff. There the plaintiff admitted that no licence was issued to the plaintiff by the defendant for two years — namely, 2000 and 2001. I need only to reproduce para 11.3 of encl 19 to prove my point:

> Had the defendant allowed the appeals and granted the licence then the plaintiff would have paid the requisite fee for the licence.

(6) By letter dated 13 October 2000, the defendant had cancelled all approvals given for the visuals and requested the plaintiff to dismantle and remove the '*Marlboro*' advertisement.

(7) The defendant was magnanimous and arising out of the meeting between the parties, the grouses of the plaintiff were heard and the plaintiff was eventually allowed to display the '*Marlboro*' advertisement until 31 December 2000 (see the plaintiff's letter dated 19 October 2000 as per exh 'ZA-8' of encl 10, at p 24). It seemed that the plaintiff was happy with this new development because no challenge was taken by the plaintiff in respect of the decision of the defendant to allow the plaintiff to continue to display the '*Marlboro*' advertisement until 31 December 2000 only.

(8) Of pertinence would be this: that no licence was issued for the year 2000 and, consequently, no licence fee was paid by the plaintiff to the defendant for the year 2000. If this were to happen elsewhere, legal sanctions would be undertaken forthwith. But despite this, the plaintiff alleged that the defendant had failed to comply with the principles of natural justice. Be that as it may, as the licensing authority, the defendant is empowered under By-Law 8(4) of the AFT By-Laws to refuse to issue or to renew a licence without giving any reason and, consequently, the question of natural justice does not arise at all.

(9) The defendant notified the plaintiff by letter dated 14 December 2000 to dismantle and remove the '*Marlboro*' advertisement by 31 December 2000 and that notice was not a notice to cancel a licence.

(10) By letter dated 22 December 2000, the plaintiff appealed to the defendant against the defendant's notice dated 14 December 2000. Now, it must be emphasized that the letter dated 22 December 2000 was not an application to renew a licence or to apply for a licence.

(11) Upon the expiry of the dateline to remove the '*Marlboro*' advertisement on 31 December 2000, the plaintiff continued to display the said advertisement from 1 January 2000.

(12) By letter dated 19 February 2001, the defendant gave the plaintiff a notice to dismantle and remove the '*Marlboro*' advertisement. It must be emphasized that there was no application to apply for a licence for the year 2001.

(13) No licence was ever issued for the year 2001.

The factual chronology as alluded to above showed the blatant failure of the plaintiff to secure licences for the years 2000 and 2001. The defendant should have prosecuted the plaintiff in a court of law as an example to others. The sum total of it all was this: that the plaintiff's case for a declaration that the defendant had withdrawn the licence unilaterally without giving a fair hearing to the plaintiff was devoid of any merits and it was solely filed to delay and frustrate the defendant from exercising his statutory duties. Based on the pleadings and the facts as presented in this judgment, the plaintiff had failed to satisfy the pre-requisite test as laid down in *Smith*'s case in that there was no real prospect of succeeding for a permanent injunction at the trial. Even if I were to apply the *American*

Cyanamid test 'of a serious question to be tried', the plaintiff stood on a weak ground. For all these reasons, the plaintiff's application for an injunctive relief ought to be dismissed.

Would damages be an adequate remedy?

The plaintiff submitted that damages would not be an adequate remedy while the defendant held a contrary view.

It was the plaintiff's stand that it had a reputation to maintain and that there was a loss of confidence of its current and future clients. The defendant vehemently said that it was totally baseless on the part of the plaintiff to say that its reputation was severely affected. It must be recalled that there was a meeting between the parties in 12 February 1998 and in that meeting the plaintiff was made to understand that the licence for the '*Marlboro*' advertisement would only be extended until 31 December 1999. It was rightly pointed out that if the plaintiff was a responsible company, it ought to have notified its client in regard to the status of the licence. Furthermore, the plaintiff should act with circumspection and must act within the confines of the AFT By-Laws. The plaintiff should be wary and must not enter into any contract with its client unless it has secured a licence from the defendant. The conduct of the plaintiff in not complying with the provisions of the law and had entered into a contract with its client without a valid and subsisting licence was a conduct not befitting a responsible company. It was a perilous course of action for the plaintiff to undertake when it entered into a contract without knowing whether the licence would be issued by the defendant. The plaintiff was solely to be blamed. In my judgment, the plaintiff had failed to show that damages was not an adequate remedy. A passage that appears in the judgment in the case of *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* at p 327 thereof strikes a familiar chord with the facts of the present case. There it was stated:

> Even assuming there is a serious question to be tried or that she has a real prospect of succeeding she must also show that damages would not be an adequate remedy. She has not however made even an attempt to do so.

Once damages are the proper remedy, an injunction will not be issued. In this connection, the following germane passages appearing in *Saw Seng Kee* (particularly at pp 81–82) are certainly useful to remember:

> This brings me to the next ground on which I dismissed their applications.
>
> 'The very first principle of law,' said Lindley LJ in *London Blackwall Railway Co Cross* (1886) 31 Ch D 354, at p 369:
>
> > '... is that *prima facie* you do not obtain an injunction to restrain actionable rights in which damages are the proper remedy.'
>
> In *American Cyanamid*'s case, Lord Diplock made the same point at p 408B, C in the following terms:
>
> > '[T]he court should first consider whether, if the plaintiff were to succeed at the trial in establishing its right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants continuing to do what was

> sought to be enjoined between the time of the application and the time of the trial. If damages ... would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage'.
>
> In these circumstances, as I had no doubt as to adequacy of the plaintiffs' remedy lying in damages should they succeed in their claims at the final hearing, there was no need for me to consider the further question of the balance of convenience (see *American Cyanamid*'s case at p 408). But, had it been necessary to do so, then I was satisfied that the balance of convenience favoured the Urban Development Authority rather than the plaintiffs.

If at all the damages which the plaintiff might sustain, it would be in the region of RM675,000pa and this sum was sufficiently averred at para 15.1 of encl 19 which was worded in this way:

> By an agreement dated 31 December 1997 between the plaintiff and Godfrey Phillips (M) Sdn Bhd, the neon billboard was leased for the sum of RM675,000pa for the display of the *Marlboro* advertisement. A copy of the said agreement is exhibited herewith and marked 'P2'.

A perusal of the said agreement in 'P2' showed that the agreement would expire on 31 December 2000. And so by letter dated 24 August 2000 the plaintiff implored the defendant to allow the '*Marlboro*' advertisement to remain on the said premise. It was a letter couched by way of an appeal and the defendant acceded to it bearing in mind that the contract with the plaintiffs client for the '*Marlboro*' advertisement would expire on 31 December 2000. So the defendant took no action to remove that '*Marlboro*' advertisement until the expiry on 31 December 2000. But that did not mean that the licence for the year 2000 was given to the plaintiff. In fact, the plaintiff did not apply for the licence for the year 2000 nor did the plaintiff apply for the licence for the year 2001.

Since damages was easily quantifiable at RM675,000pa it was thus an adequate remedy and the injunctive relief ought to be disallowed forthwith. There was no affidavit evidence to show that the defendant's financial means to pay substantial damages was suspect (*Evans Marshall & Co Ltd v Bertola SA & Anor* [1973] 1 All ER 992 and *Morning Star Co-operative Society Ltd v Express Newspapers Ltd* [1979] FSR 113). But I have no doubt as to the sufficiency of the damages and it would be an adequate remedy.

Balance of convenience

Lord Diplock in *American Cyanamid*'s case said at p 511 that '... where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.'

To determine the balance of convenience or the 'balance of justice' as was said by Sir John Donaldson MR in *Francome & Anor v Mirror Group Newspapers Ltd & Ors* [1984] 2 All ER 408 at p 413, one must examine all the relevant facts and give appropriate weight to it accordingly. The facts would certainly vary from case to case.

In the present case, the balance of convenience weighed heavily in favour of the defendant who was merely performing a duty under the statute. It was indeed a statutory duty. It must be recalled that sufficient notice had been given to the plaintiff that the licence would not be renewed after 31 December 1999. This was discussed in a meeting on 12 February 1998 and was alluded to in a letter dated 17 February 1998 as seen in encl 12 of exh 17 at p 10. When the dateline expired, the plaintiff continued to display the '*Marlboro*' advertisement after 31 December 1999. The defendant was magnanimous and decided not to take any action to remove the '*Marlboro*' advertisement until 31 December 2000 but the plaintiff showed no respect at all and continued to display the said advertisement at the said premise after 31 December 2000 despite the expiry of the contract between the plaintiff and its client. In my judgment, the plaintiff had shown utter and gross disrespect to the defendant and more importantly to the provisions of the law in the country. The balance of convenience would certainly favour the defendant — the law enforcing agency in the city of Kuala Lumpur in the context of the advertisement on the said premise. The defendant cannot be labelled as a toothless tiger. This court must give effect to the law. The city of Kuala Lumpur must be run according to the law. Advertisements without licences that were displayed everywhere in Kuala Lumpur would give rise to negative influences. It is the job of the defendant to see that that won't happen.

Since an injunctive relief is an equitable remedy, the plaintiff must come to this court with clean hands. The plaintiff's conduct in obtaining the ex parte injunction was tainted with illegality and this meant that the plaintiff came to court with unclean hands.

The untimely demise of the inherent powers of the court under O 92 r 4 of the RHC

The Court of Appeal in *Cheah Cheng Lan v Heng Yea Lee* [2001] 1 MLJ 433 (CA) (coram of Lamin PCA, Mokhtar Sidin and Abdul Kadir Sulaiman JJCA) strictly construed the RHC. Lamin PCA said at p 436 of the report that:

> The court has no power to extend the life of an ex parte injunction beyond 21 days because of the words 'shall automatically lapse'.

and at p 437 of the report, he said:

> With the operation of sub-r (2B) and (2BA), the life span of an ex parte injunction has been properly determined. It does not therefore admit the use of the inherent powers of the court as provided under O 92 r 4.

That was a cut and dry judgment but I am bound by it.

Conclusion

For the reasons adumbrated above, I must give an order in terms of encl 10 and dismiss encl 17 with costs.

This written judgment was prepared well in advance. On 29 December 2001, a Saturday, a court vacation day, I announced the decision in the

presence of counsel on both sides. After having done so, the plaintiff's counsel informed this court that he was instructed to withdraw the whole action with costs to be assessed. The defendant's counsel submitted that he had no objection but he requested that costs should be assessed and payable to the defendant. How I wish that the counsel for both sides had informed me of the new development well in advance before I put my wet pen to paper? Be that as it may, it was recorded that by consent of the parties the whole suit was struck out with costs to be assessed and payable to the defendant.

Order accordingly.

Reported by Peter Ling